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No 438

Supreme Court of the United States

OCTOBER TERM, 1946

HARRIS-STANLEY COAL & LAND COMPANY, et al.,

PETITIONERS,

vs:

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The opinion of the Circuit Court of Appeals, Sixth Circuit, is reported in *154 Fed. (2) 450*, and is reprinted at R. 294, et seq. The opinion of the District Court is reported in *56 F. Supp. 849*, and is reprinted at R. 50, et seq.

I.

No Grounds Exist Herein for the Granting of Certiorari.

(A) The question involved in this litigation is as to the right of the respondent railway company to injunctive relief against a threatened mine operation which

would create a situation dangerous to the operation of the railroad. There is no showing of any ground for certiorari under the provisions of

Rule 38, Rules of the Supreme Court.

(B) Granting of certiorari is not warranted merely to review the evidence or inferences drawn from it.

Gen. Talking Pictures Corp. v. Western El. Co., 304 U. S. 175.
Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U. S. 508.
United States v. Johnston, 268, U. S. 220.

(C) Certiorari will not be granted "merely to give the defeated party in the circuit court of appeals another hearing."

Magnum Import Co. v. Coty, 262 U. S. 159.

II.

The Merits of the Case.

The issue directly presented is whether, in the light of all the circumstances, there is threat of injury in the proposed operations of the petitioner to the property of the railroad and to passengers and crews upon its trains or of disruption of train service and consequential inconvenience and loss to shippers and passengers. The finding of the Circuit Court of Appeals of the existence of such danger is amply supported by the evidence and the admitted physical facts, disclosed in the Court's opinion. Such conclusion also follows from the finding of the District Court (59, R.) that "there is possibility or even probability that the mountainside will slip or subside" as the result of the threatened mining operation. For this threatened danger there is no adequate relief at law, and injunctive relief is proper.

Joy v. City of St. Louis, 138 U. S. 1, 46.
Seaboard Airline R. Co. v. Olive, 142 N. C. 257, 55 S. E. 263.
Atchison, T., & S. F. Ry. Co. v. Spaulding, 69 Kan. 431, 77 Pac. 106.

The right of the respondent to injunctive relief against the threatened mining operation is based upon the reasoning in *Kansas City So. Ry. Co. v. Sandlin, 173 Mo. App. 384, 158 S. W. 857*, wherein, in the consideration of an almost identical situation, it was said:

> "* * * when it comes to a question of property rights only as against the safety and preservation of human life and limb, we think it is sufficient that the evidence reasonably shows the certainty that the *danger* exists rather than the certainty that a fatal disaster will occur. We think we should take cognizance that the law requires the *highest* degree of care on the part of carriers of passengers in maintaining a safe roadbed as well as in the actual operation of its trains. * * * It seems reasonable that, if the law requires this high degree of care on the part of railroads in maintaining a safe track and roadbed, the courts ought to see to it that they are not hampered in so doing."

The findings of the District Court, upon which the judgment of dismissal was based, were not binding upon the appellate court. The essential facts, for the most part physical, are not in dispute, and the conclusion as to whether or not the operation of the railroad is endangered by the threatened mining operation, is one which the reviewing court is competent to draw from the admitted or established facts. The judgment of the District Court was primarily based upon the conclusion that the respondent railway company had an adequate remedy at law, which was a conclusion of law and not binding upon the appellate court.

Stubbs v. Fulton Nat. Bank, (C. C. A. 5), 146 Fed. (2) 558, cer. den., *325 U. S. 864.*
Murray v. Noblesville Milling Co., (C. C. A. 7) 131 Fed. (2) 470, cer. den., *318 U. S. 775.*
Equitable Life Assur. Soc. v. Irelan, (C. C. A. 9), 123 Fed. (2) 462.
Kuhn v. Princess Lida of Thurn & Taxis, (C. C. A. 3), 119 Fed. (2) 704.
In Re Chicago & N. W. R. Co., (C. C. A. 7), 110 Fed. (2) 425.

The fact that the respondent railway company possesses the power of eminent domain and may condemn land necessary for the protection of its right of way, is not a limitation upon its right to injunctive relief against threatened trespasses resulting from a wrongful or unreasonable use of adjacent property. As pointed out by the appellate court, such argument defeats itself because if the threat of injury is too remote to sustain injunctive relief, it is likewise too remote to establish necessity for condemnation. Moreover, the rule that equity will not interfere by injunction, if damages will provide adequate compensation for the threatened injury, contemplates recovery *from* the wrongdoer, not *by* him.

It is respectfully submitted that the petition for certiorari should be denied.

LeWRIGHT BROWNING,
Counsel for Respondent.